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# In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-377

RICHARD I. LUDWIG,
APPELLANT,

*v.*

COMMONWEALTH OF MASSACHUSETTS,
APPELLEE.

**ON APPEAL FROM THE SUPREME JUDICIAL COURT OF MASSACHUSETTS**

## BRIEF FOR THE APPELLANT

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## BRIEF FOR THE APPELLANT

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### Opinion Below

The opinion of the Supreme Judicial Court of Massachusetts is reported in 1975 Massachusetts Advance Sheets 1994 and at 330 N.E. 2d 467.

## JURISDICTION

The jurisdiction of the Supreme Court to review the decision of the Supreme Judicial Court on direct appeal is conferred by 28 U.S.C. §1257(2).

The judgment from which this appeal is taken was rendered on June 12, 1975, by the Supreme Judicial Court and notice of appeal was filed in the Supreme Judicial Court on September 3, 1975. Appellant's jurisdictional statement was filed in this Court on September 10, 1975. Probable jurisdiction was noted on November 11, 1975. Jurisdiction is supported by Costarelli v. Massachusetts, 421 U.S. 193 (1975).

Section 1257(2) is specifically invoked as the constitutionality of Massachusetts' statutory two-tier trial de novo criminal procedure was held not to be repugnant to the Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States. The statutory procedure is comprised of Article XII of the Massachusetts' Declaration



of Rights[1] which provides that no person "shall be... deprived of his... liberty... but by the judgment of his peers"; G.L. Ch. 218 §26 conferring criminal jurisdiction on the courts in the first tier of Massachusetts' two-tier criminal procedure; and G.L. Ch. 278 §§18, 18A, providing a "right to appeal" to the various courts of the second tier of the system. These statutory provisions have been construed by the Supreme Judicial Court to mean that an accused is to be tried initially in a lower court which "sits without a jury" but that he may have a trial by jury by claiming an "appeal" to a second tier court, Jones v. Robbins, 8 Gray 329, 336, 341-342 (1858); and it is this procedure which was sustained against constitutional attack by the Supreme Judicial Court.

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1 For the purpose of §1257(2), a provision of a state constitution is equivalent to a state "statute", Railway Express Agency v. Virginia, 282 U.S. 440 (1931).

## QUESTIONS PRESENTED

1A. Does Massachusetts have a right to deprive an accused of one or more fundamental procedural rights in a criminal trial if it thereafter accords him a trial with the full panoply of rights guaranteed by the Constitution?

1B. Where an accused is entitled to a jury verdict, does the interposition of a trial by judge before a trial by jury impose an unconstitutional burden on the right to trial by jury?

2. Where an accused is entitled to a jury trial, does Massachusetts' procedure of forcing the accused to stand trial before a judge as a prerequisite to obtaining a jury verdict violate the double jeopardy provisions of the Fifth Amendment?

## STATUTES INVOLVED

Article XII of the Declaration of Rights of the Massachusetts Constitution, Massachusetts General Laws (ter. ed.) Ch. 263 §6, Ch. 218 §§26, 27A, Ch. 278 §§2, 18, 18A, 20 and 24, comprise the framework of Massachusetts' two-tier criminal procedure and are set forth in the appendix to this brief (hereinafter Br. App.).



## STATEMENT OF THE CASE

Richard I. Ludwig was charged in the District Court of Northern Norfolk pursuant to G.L. Ch. 218 §26 with driving an automobile negligently so that the lives and safety of the public were endangered, a criminal offense set out in G.L. Ch. 90, §24(2)(a)[2] carrying a possible maximum sentence of a fine of $200, or two years of imprisonment, or both. At the commencement of his trial, Ludwig duly moved[3] the district court for a "speedy jury trial" pursuant to his rights under the Fifth and Sixth Amendments. The judge denied this motion, and after a trial, found Ludwig guilty of the offense charged. Thereupon, Ludwig claimed an "appeal" for a trial de novo in the District Court of Northern Norfolk Six-Man Jury pursuant to G.L. Ch. 278 §18 and Ch. 218 §27A.

In the de novo proceedings, Ludwig duly filed a "motion to

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2 The relevant parts of G.L. Ch. 90 §24(2) are set out in the Br. App. at p. 12a.

3 See App. p. 7a.

dismiss" on the grounds that he was denied a speedy jury trial in the first instance.[4] This motion was denied and Ludwig took an exception pursuant to G.L. Ch. 278 §31. After being found guilty in a jury-waived trial and sentenced to pay a $20 fine, payment of which was stayed, Ludwig filed a bill of exceptions to the Supreme Judicial Court pursuant to G.L. Ch. 278 §31 alleging that the denial of his "motion to dismiss" was error. The Supreme Judicial Court overruled the exceptions, Commonwealth v. Ludwig, Mass. Adv. Sht. [1975] p. 1994, 330 N.E. 2d 467. It held that "the claimed infractions of constitutional rights - the right to a speedy trial under the Sixth Amendment, the right to a jury trial under the Sixth Amendment and Article 12 of the Massachusetts Declaration of Rights, and the guaranty against double jeopardy" were "properly" before the court and "untenable": "We have suffered no change of mind on the constitutional issues since the Whitmarsh decision."

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4 See App. p. 5a.



## SUMMARY OF THE ARGUMENT

Massachusetts maintains a two-tier de novo criminal procedure. For most offenses, the accused is brought to trial initially in a first tier court where he is tried before a judge. He cannot obtain a trial by jury, but if he is dissatisfied with the judgment of the lower court, he may "appeal" to the second tier where he may obtain a trial de novo by jury as a matter of right. If the defendant is found guilty in the second tier court, he can obtain traditional appellate review of this conviction in the Massachusetts Appeals Court or Supreme Judicial Court.

In Callan v. Wilson, 127 U.S. 540, 557 (1888), this Court unanimously held that the right to trial by jury secured to the accused "the right to enjoy that mode of trial from the first moment, and in whatever court, he is put on trial for the offense charged". In Duncan v. Louisiana, 391 U.S. 145, 149, 158 ftn. 30 (1968), this Court held that the Fourteenth Amendment guaranteed "a right of jury trial in all criminal cases which - were they to be tried in

a federal court -would come within the Sixth Amendment's guarantee", and hence, by implication, bound Massachusetts to the rule of Callan v. Wilson, subject to the qualification in Justice White's ftn. 30 that the Court's decisions interpreting the Sixth Amendment were "always subject to reconsideration".

Appellant maintains that the essence of the rule of Callan v. Wilson is that the accused should not be put "to the burden of two trials if he wishes a jury verdict" and that the interposition of a trial by magistrate is an unconstitutional imposition on the exercise of the right to trial by jury. The burden on the right to trial by jury includes the additional expense the accused must bear for a meaningless trial in the lower court, the embarrassment of being found guilty and "appealing", the stigma and anxiety resulting from conviction, and the threat of an increased penalty upon reconviction in the second tier.

The burden of a lower court trial cannot be circumnavigated as was the situation in Colten v. Kentucky, 407 U.S. 104 (1972).



On the other hand, if the defendant remains silent and is convicted, collateral consequences, e.g. loss of one's driver's license, are imposed notwithstanding the fact that the "judgment" of the first tier court is "vacated" by the accused's exercising his right of "appeal" for a de novo jury trial in the second tier. Likewise, if the accused fails to "prosecute his appeal, he shall be defaulted on recognizance and the superior court may impose sentence upon him for the crime of which he was convicted."

Quite apart from its being a burden, the interposition of a trial by magistrate runs counter to the "purpose" and "function" of the right to trial by jury, namely, to protect the accused from governmental oppression,and to interpose "between the accused and his accuser...the commonsense judgment of a group of laymen." From this it follows that the rule of Callan v. Wilson is an essential element of a jury trial in contradistinction to the unanimity or twelve-man requirements which are "features" relating to the composition of a jury.

In a nutshell, appellant submits that once a defendant is placed in jeopardy, Massachusetts has no more right to deprive him of his right to trial by jury than his right to counsel, or his right to remain silent, or his right to confront witnesses. It is no answer on Massachusetts' part to say that it offers the defendant a trial de novo with the full panoply of Sixth Amendment procedural rights. Similarly, Massachusetts has no compelling state interest to deny the accused a trial by jury in the first instance as it may accomplish its purpose of conserving its judicial resources by maintaining a two-tier structure while simultaneously allowing a defendant the choice of proceeding in the first tier initially or obtaining a jury trial in the first instance in the second tier as is the procedure in Rhode Island in the aftermath of State v. Holliday, 109 R.I. 93 (1971).

Lastly, appellant maintains that Massachusetts' de novo procedure violates the double jeopardy provisions of the Fifth Amendment. Manifestly, the procedure subjects a defendant to the threat of multiple trials. Upon conviction in a lower court, the accused is subjected to the "embarrassment" of being



found guilty and "appealing" in a criminal proceeding. While awaiting his "trial de novo" in the second tier court, he is compelled "to live in a continuing state of anxiety and insecurity". Additionally, the de novo trial in the second tier subjects the accused a second time to the "heavy personal strain" which a criminal trial represents. As such, this procedure is not consonant with the Fifth Amendment mandate of limiting "the government to a single criminal proceeding to vindicate its very vital interest in enforcement of criminal laws".

## ARGUMENT

### I - THE TWO-TIER TRIAL DE NOVO PROCEDURE

The first tier of Massachusetts' two-tier de novo system is comprised of the district courts and the Municipal Court of Boston. These courts have jurisdiction over all misdemeanors and crimes carrying a possible maximum prison sentence of five years or less, and certain enumerated felonies having possible maximum prison sentences in excess

of five years.[5] Criminal proceedings in a first tier court are commenced by the issuance of a complaint. If the defendant pleads guilty to the complaint at arraignment, he is sentenced by the district or municipal court. If he is dissatisfied by the sentence, he may "appeal"[6] the issue of his sentence to a court in the second tier of the de novo structure, but he is not entitled to a de novo trial in the second tier on his innocence or guilt, Commonwealth v. Crapo, 212 Mass. 209, 210 (1912).

If the defendant pleads not guilty in the first tier court,

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5 G.L. 218 §26 (Br. App. 2a). This jurisdiction is concurrent with the superior court in the second tier, but as a matter of practice, prosecution is almost always commenced in the first tier courts. See generally Smith, Massachusetts Criminal Practice and Procedure, §44.

6 G.L. Ch. 278 §§18, 18A (Br. App. 2a, 8a).



he must stand trial before a judge as the first tier court "sits without jury". If he is convicted in a district court, he may "appeal" either to the superior court[7] where he may obtain a twelve-man jury or the Six-Man Jury division of the district court[8] where he may obtain a six-man jury. If he is convicted in the Municipal Court of Boston, he may "appeal" to the superior court where he may obtain a twelve-man jury, or alternatively,[9] he may "appeal" to the Twelve-Man Jury division of the Municipal

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7 G.L. Ch. 278 §§2, 18 (Br. App. a).

8 G.L. Ch. 218 §27A (Br. App. 4a). The only practical difference to this alternative is the shorter time in obtaining a jury trial as compared to the time required for obtaining a jury trial in the superior court.

9 G.L. Ch. 278 §18A (Br. App. 8a).

Court of Boston.[10] If a defendant fails to "prosecute his appeal [in the second tier], he shall be defaulted on his recognizance and the superior court may impose sentence upon him for the crime of which he was convicted, as if he had been convicted in said court", G.L. Ch. 278 §24. (emphasis added)

If a defendant is found guilty in a second tier court, he may obtain, by right, appellate review of his conviction in the Massachusetts Appeals Court or the Supreme Judicial Court.[11]

## II - THE SIXTH AMENDMENT JURY TRIAL GUARANTEE MEANS TRIAL BY JURY IN THE FIRST INSTANCE AND IS MADE APPLICABLE TO MASSACHUSETTS BY THE FOURTEENTH AMENDMENT

In Jones v. Robbins, 8 Gray

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10 Hence, the second tier of the Massachusetts system is comprised of the superior court, the Six-Man Jury division of the district courts, and the Twelve-Man Jury division of the Municipal Court of Boston.

11 G.L. Ch. 278 §§28, 31, 33A-33G.



329, 341 (1958), Chief Justice Shaw of the Massachusetts Supreme Judicial Court concluded that the right to trial by jury did not mean trial by jury in the first instance, but only that the Commonwealth must afford an accused a jury trial at some time. In reaching this result, the eminent Chief Justice was construing Article XII of the Declaration of Rights[12] guaranteeing that no law "shall subject any person to... infamous punishment... without trial by jury", a clause which he noted was "equivalent" to the Sixth Amendment provision: "...in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury...". More specifically, the Chief Justice held:

> And we believe it has been generally understood and practiced here and in Maine, and perhaps in other States having a similar provision, that as the object of the clause is to secure a benefit to the accused, which he may avail himself or waive, at

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12 Br. App. p. 1a.

his own election; and as the purpose of the provision is to secure the right, without directing the mode in which it shall be enjoyed; it is not violated by an act of legislation, which authorizes a single magistrate to try and pass sentence, provided the act contains a provision that the party shall have an unqualified and unfettered right of appeal, and a trial by jury in the appellate court, subject only to a common liability to give bail, or to be committed to jail, to insure his appearance and to abide the judgment to the court appealed to.[13]

Thirty years later, in Callan v. Wilson, 127 U.S. 540 (1888), this Court had occasion to review the consitutionality of the District of Columbia's two-tier trial de novo procedure which was identical to the Massachusetts system.[14] In its decision, Justice Harlan took note at p. 553-4 of the aforesaid

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13 See also Mann v. Commonwealth, 359 Mass. 661, 663-664 (1971).

14 Callan v. Wilson, supra, p. 551.



quoted portion of Chief Justice Shaw's opinion, and then rejected its reasoning at p. 556-7:

> Except in the class or grade of offenses called petty offenses,...the guarantee of an impartial jury to the accused in a criminal prosecution, conducted either in the name, or by or under the authority of the United States, secures to him the right to enjoy that mode of trial from the first moment, and in whatever court, he is put on trial for the offense charged. In such cases, a judgment of conviction, not based upon a verdict of guilty by a jury, is void. To accord to the accused a right to be tried by a jury, in an appellate court, after he has been once fully tried otherwise than by a jury, in the court of original jurisdiction, and sentenced to pay a fine or be imprisoned for not paying it, does not satisfy the requirement of the Constitution. When, therefore, the appellant was brought before the Supreme Court of the District, and the fact was disclosed that he had been adjudged guilty

> of the crime of conspiracy charged in the information in this case, without ever having been tried by a jury, he should have been restored to his liberty.

This decision, of course, was not binding upon Massachusetts. However, in Duncan v. Louisiana, 391 U.S. 145, 149 (1968), this Court made the Sixth Amendment applicable to the states:

> [W]e hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which - were they to be tried in a federal court - would come within the Sixth Amendment's guarantee;

and at p. 157:

> Our conclusion is that in the American States, as in the federal judicial system, a general grant of jury trial for serious offences is a fundamental right, essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants. (emphasis added)



The State of Louisiana argued against this holding on the grounds that "if due process is deemed to include the right to jury trial, States will be obligated to comply with all past interpretations of the Sixth Amendment including the guarantee for a twelve-man jury, the unanimous verdict requirement, and the rule of Callan v. Wilson, 127 U.S. 540". In rejecting this agrument, Mr. Justice White observed at p. 158, ftn. 30:

> It is very unlikely to us that our decision today will require widespread changes in state criminal processes. First, our decisions interpreting the Sixth Amendment are always subject to reconsideration, a fact amply demonstrated by the instant decision... . Indeed, there appear to be only four States in which juries of fewer than twelve can be used without the defendant's consent for offenses carrying a maximum penalty of greater than one year. Only in Oregon and Louisiana can a less-than-unanimous jury convict for an offense with a maximum penalty greater than one year. However, ten

> states authorize first-stage trials without juries for crimes carrying lengthy penalties; these States give a convicted defendant the right to a de novo trial before a jury in a different court.

The breadth of the majority opinion is made clear by Mr. Justice Fortas in his concurring opinion at p. 213: "But although I agree with the decision of the Court, I cannot agree with the implication, see ante, at p. 158, ftn. 30, that the tail must go with the hide: that when we hold, influenced by the Sixth Amendment, that 'due process' requires that the States accord the right of jury trial for all but petty offenses, we automatically import all of the ancillary rules which have been or may hereafter be developed incidental to the right to jury trial in the federal courts." Similarly, Mr. Justice Harlan acknowledged the same in his dissent at p. 181:

> Consequently, the court has compromised on the ease of the incorporationist position, without its internal logic. It has simply assumed that the question before us is



> whether the Jury Trial Clause of the Sixth Amendment should be incorporated into the Fourteenth jot-for-jot and case-for-case, or ignored. Then the Court merely declares that the clause in question is 'in' rather than 'out'.

Duncan was followed by Baldwin v. New York, 399 U.S. 66 (1970), wherein five out of eight members of this Court "agreed that, at the very least, the Sixth Amendment requires a jury trial in all criminal prosecutions where the term of imprisonment authorized by statute exceeds six months".[15] Of the five members, three drew the demarcation line between "petty" and "serious" crimes at six months[16] as is defined by common law[17] and in the federal

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15 Codispoti v. Pennsylvania, 418 U.S. 506, 512 ftn. 4 (1974).

16 Cf. Callan v. Wilson, 127 U.S. 540, 549, 556 (1888).

17 Frankfurter & Corcoran, Petty Federal Offenses and the Constitutional Guarantee to Trial by Jury, 39 Harv. L. Rev. 917, 934 (1926).

system[18], and two held that the jury trial provisions of the Sixth Amendment were applicable to "all crimes".

In light of Duncan and Baldwin, Ludwig maintains that he was entitled to by a trial by jury in the district court of Massachusetts as the maximum possible sentence under G.L. Ch. 90 §24(2)(a) was a $200 fine or two years imprisonment, or both. His contentions, however, were rejected by the Massachusetts Supreme Judicial Court which relied upon Whitmarsh v. Commonwealth, ___Mass.___, 316 N.E. 2d 610 (1974).

In Whitmarsh, the Supreme Judicial Court held that the "state of the law on the subject is highly uncertain" and therefore it was not "required to conclude either (a) that the Sixth Amendment would be interpreted at the present time by the Supreme Court to require a trial by jury in the first instance.., or (b) that even if that court did reaffirm this rule... with respect to the Federal Courts, it would apply such a requirement in equal fashion to the states". Appellant submits, however, that

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18 18 U.S.C §1.



it was the duty of the Supreme Judicial Court under Article VI of the Constitution to interpret the decisons of this Court as they existed and apply them. Instead, the Supreme Judicial Court evaded the issue on the grounds that "the meaning of the Sixth Amendment's jury trial provision and perhaps also specific instances of its application to the States... continues to be in flux".

In support of its position, the Supreme Judicial Court relied upon Williams v. Florida, 399 U.S. 78 (1970), and Apodaca v. Oregon, 406 U.S. 404 (1972). In Williams, this Court held that the States are not required to afford a defendant a twelve-man jury. In reaching this conclusion, this Court in effect overruled the federal twelve-man requirement and hence this decision is entirely consistent with Mr. Justice White's remark in ftn. 30 in Duncan: "[o]ur decisions interpreting the Sixth Amendment are always subject to reconsideration... ." At the same time, Duncan itself was reaffirmed by the Court at p. 86 and by Mr. Justice Black concurring at p. 107:

We have emphatically "rejected the notion that the Fourteenth Amendment applies to the States only a 'watered down, subjective version of the individual guarantees of the Bill of Rights.'" Malloy v. Hogan, 378 U.S. 1, 10-11. Today's decision is in no way attributable to any desire to dilute the Sixth Amendment in order more easily to apply it to the States, but follows solely as a necessary consequence of our duty to reexamine prior decisions to reach the correct constitutional meaning in each case. The broad implications in early cases indicating that only a body of 12 members could satisfy the Sixth Amendment requirement arose in a situation where the issue was not squarely presented and were based, in my opinion, on an improper interpretation of that amendment. Had the questions presented here arisen in a federal court before our decision in Duncan v. Louisiana, 391 U.S. 145 (1968), this Court would still, in my view, have reached the result announced today.



In Apodaca, this Court held that the unanimous jury requirement of the Sixth Amendment was not applicable to the states. In so holding, four justices impliedly overruled the requirement as to federal trials and as such their plurality opinion is consistent with Duncan. Mr. Justice Powell reached the same conclusion, but was not in "accord with a major premise upon which that judgment" was based, namely "that the concept of jury trial as applicable to the States under the Fourteenth Amendment, must be identical in every detail to the concept required in federal courts by the Sixth Amendment", Johnson v. Louisiana, 406 U.S. 356, 369 (1972). Three justices in dissent felt that the federal standard should not be changed and hence, the states should be bound to the unanimous jury requirement on the basis of Duncan. As such, the decision is not a departure from Duncan in principle, but rather, it simply redefined "what is meant by the concept 'jury'" within the meaning of the Sixth Amendment. Accordingly, appellant submits that neither Williams or Apodaca support the Supreme Judicial

Court's position in Whitmarsh.[19]

Other state and lower federal courts have rendered conflicting opinions as to whether Duncan and Baldwin bound the states to the rule of Callan v. Wilson. The Supreme Court of Rhode Island has answered the question in the affirmative in State v. Holliday, 109 R.I. 93, 103, (1971):

> We hold, then that those charged with misdemeanors that could result, upon conviction, in the imposition of a sentence of more than six months are entitled to a speedy and prompt trial by an impartial jury in the first instance.

The Supreme Court of Virginia reached the opposite conclusion in Manns v. Commonwealth, 213 Va. 2d 233 (1972)[20] holding that Mr. Justice White's ftn. 30 in Duncan "makes

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19 See Constitutionality of the De Novo Procedure, 55 B.U. Law Review 25, 35-42 (1975).

20 Cf. Manns v. Koontz, 451 F. 2d 1345 (4th cir. 1971).



it clear" that the question of "incorporation" was an "open" one. See also to the same effect, Walker v. Dillard, 363 F. Supp. 921 (W.D.V. - 1973) which, like Manns, relied on Mr. Justice Fortas' concurring opinion to Duncan. Since these opinions are contrary to this Court's holding in Duncan, appellant alleges that they are inapposite.[21]

## III - THE INTERPOSITION OF A TRIAL WITHOUT JURY PRIOR TO AFFORDING A DEFENDANT A TRIAL BY JURY IS AN UNCONSTITUTIONAL BURDEN ON THE RIGHT TO TRIAL BY JURY

As Justice Harlan called to our attention in Baldwin v. New York, 399 U.S. 66, 137 (1970), the bedrock of Callan v. Wilson is that the accused should not be put to "the burden of two trials if he wishes a jury verdict". That "burden" was eloquently set forth by Mr. Justice Thomas of the Supreme Judicial Court in his memorable dissent in Jones v. Robbins, 8 Gray 329, 351-2 (1858):

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21 Cf. Miller v. Commonwealth, 14 S.E. 2d 161 (1892).

It seems to me plain that, when the Constitution declares that "the legislature shall not make any law that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury," its meaning is trial by jury when and wheresoever he shall be tried; not upon his second trial, nor after having been subjected to another and different mode of trial. If, for an offense subjecting him to capital or infamous punishment, the citizen may be tried once without a jury, it is not easy to see why he may not be so tried a second time; why the legislature may not provide that, upon appeal to the municipal court, he may be tried by a single judge, and postpone his trial by jury to his appeal to this court. Such a law would, indeed clog and obstruct his trial by jury; but the difference between that and this is in degree only.

The subjecting the accused to one trial by a single magistrate obstructs the rights



of a trial by jury, and essentially impairs its value. It places between the accused and a trial by jury a barrier not necessary for the security of the public, such as are the preliminary examination and the holding to bail. It interposes unnecessary delay between the accusation and trial by his peers. It subjects him to unnecessary and often fatally burdensome expense before he can reach the tribunal by which it is his right and his security to be tried. The subject cannot be said, under such a law, to obtain his right "freely, and without being obliged to purchase it; completely, and without any denial; promptly, and without delay".

When you state the proposition that a man may be constitutionally tried for murder by a justice of the peace or a police court, or by any single judge, even after indictment, and he cannot have a trial by jury until he has been tried by a single magistrate, I think every mind familiar with the Constitution, and with the common law rights

secured by it, shrinks from the conclusion; yet it is to be observed, that the twelfth article of the Bill of Rights makes no distinction between laws subjecting the citizen to capital and those subjecting him to infamous punishments. They stand on the same ground.

I am aware that in some text-writers of authority, and in the dicta of judges for whom I feel the highest respect it has been said, that if there is an unobstructed and unclogged right of appeal to a court in which a trial by jury can be obtained, the article of the Bill of Rights is satisfied. To this view I answer...[t]hat it is not an unobstructed and unclogged right of appeal, which the twelfth article secures, but an unobstructed and unclogged right of trial by jury.[22]

Initially, it is observed that Justice Thomas recognized

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22 "To these weighty words of Judge Thomas no satisfactory reply has ever been made." State v. Gerry, 68 N.H. 495, 507 (1896).



the possibility that if a "citizen may be tried once without a jury, it is not easy to see why he may not be so tried a second time". This same objection was raised by Justice Blatchford in In re Dana, 7 Benedict 14 (1876): "If Congress has the power to deprive the defendant of his right to a trial by jury, for one trial,... it is difficult to see why it may not also have the power to provide several trials by a court, without a jury, on several successive convictions, before allowing a trial by jury". Cf. Williams v. Florida, 399 U.S. 78, 91 ftn. 28 (1970).

The "unnecessary and often fatally burdensome expense" referred to by Justice Thomas includes the defendant's legal fees, witness fees, and his loss of time and pay. For the accused who is innocent, but found guilty, he must bear these expenses for a meaningless proceeding before he ever gets into court where he may obtain a jury verdict. While it is true that Massachusetts assigns indigents free counsel,[23] Argersinger v.

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23 Rule 3:10 of Rules of the Supreme Judicial Court; G.L. Ch. 221 §34D.

Hamlin, 407 U.S. 25 (1972), there are many defendants who are just above the indigent level and must hire private counsel for their defense in the lower Massachusetts courts.[24] On the average, this expense is in the range of $150 - $250. If the defendant "appeals" for a trial de novo he must pay further counsel fees of a minimum of $400. Cf. Massachusetts Bar Association's Minimum Fee Schedule (1973). The expense of the lower court trial is often "fatally burdensome". For example, this attorney witnessed a trial in a district court in which a school teacher was convicted for larceny of merchandise from a discount store. Upon conviction the defendant's lawyer informed him of his right to a jury trial. The defendant asserted his innocence and indicated he

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24 Recognizing this problem, the Boston Bar Association has established MIDA, a marginally indigent defendant program wherein participating attorneys represent those who are just above the poverty level at rates that range $75-$150 depending upon the nature of the charges.



wanted to "appeal". His counsel then informed him that the cost for his services on "appeal" for arraignment and trial would be $450. The defendant replied: "Well, I already have lost two days pay and $250 and if we appeal it will cost me another two days pay and $450 more. I cannot afford that. We better take the best deal we can get here."[25]

In and above the financial burden, a Massachusetts' lower court trial has a dampening effect on the right to trial by jury. Some of the more discouraging aspects of the proceeding are summarized by Bing and Rosenfeld in The Quality

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25 "We have concluded on the basis of hard statistical data that in determining guilt or innocence, a man's finances are more important than the circumstances surrounding the charge, and ultimately, money determines the final disposition," Bing and Rosenfeld, The Quality of Justice (1970), p. ix. See also Hasler, De Novo Jury Trials, 23 Maine Law Rev. 63, p. 82-83 (1971).

of Justice in the Lower Courts of Boston, (1970) (hereinafter The Quality of Justice) at p. 105-6:

> Arguments on motions when they are brought, pit the judge and defense counsel as adversaries. The police prosecutor, unfamiliar with controlling court decisions, participates only to comment upon the facts. The burden falls upon the judge first to develop the arguments in opposition to the defense motion, and then decide who has made the better argument.
>
> When defense counsel make motions to suppress illegally obtained evidence, district court judges frequently reserve decision until the entire case has been heard. If he thinks the defendant is guilty - influenced in part by the questionable evidence - rather than weighing the motion exclusively on its merits, he is in a position to balance the legal merits of the motion against the seriousness of the crime.
>
> The trials themselves are brief. One judge's impatience



> with zealous defenses was expressed when he remarked to a defense counsel, "We don't follow those Supreme Court decisions here."
>
> The formal requirement for a guilty finding is proof beyond a reasonable doubt. In district court trials, there are strong indications that the government's burden is reduced to showing that the preponderance of the evidence establishes the defendant's guilt....
>
> At the heart of the district court's attitude, which overlooks rules of law and guaranteed rights, is the belief that the defendant can always protect himself by asserting his right to trial de novo.

The most graphic illustration that the law of the land is ignored in the first tier Massachusetts courts is set forth in Arnold v. Second District Court, No. 75-321, now pending in the Supreme Judicial Court. In this case, the trial judge of a district court refused to pass on the constitutional issues raised by defense counsel, or to put in his own words:

> I've said it on the record. It's now going on the record that I don't have the power or authority to strike the statute down in a constitutional sense, and the only court that has that power is the Supreme Court of Massachusetts.

Compare Huffman v. Pursue Ltd., 421 U.S. 592, 611 (1975): "Yet, Article VI of the Constitution declares that 'the judges in every state shall be bound' by the Federal Constitution laws and treaties."

The most graphic illustration that the burden of proof is reduced to the preponderance of the evidence is a case reported by Bing and Rosenfeld, The Quality of Justice (1970), at p. 83. In this decision, the trial judge resolved the conflicting testimony of the defendant and police officers by holding: "Well I don't know who to believe. Just to play safe I will find you guilty."

Quite apart from the trial itself, the sentencing procedure is often a fatal deterrent on the exercise of the accused's right to trial by jury. For example, in Costarelli v. Municipal Court of Boston, Mass. Adv. Sht. [1975]



481, 483, 323 N.E. 2d 859, 860, the trial judge in the Municipal Court of Boston announced that he would impose a one year suspended jail sentence if the defendant would forgo his "right to appeal" for a trial by jury, or otherwise he would impose a one year sentence. When this attorney objected to the choice the trial judge addressed Costarelli: "Take your pick, one year suspended with no appeal, or one year with appeal".[26] Costarelli exercised his "right of appeal" in accordance with his counsel's strong advice and over his own judgment. The trial judge then imposed the one year sentence. This type of sentence conditioning is not the result of personal vindictiveness, cf. Blackledge v. Perry, 417 U.S. 21 (1974), but rather it is the product of the institu-

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26 For a more detailed description of this technique, see Bing and Rosenfeld, The Quality of Justice (1970), at p. 86-88. For another paradigm, see Grayson v. Montgomery, 421 F. 2d 1306 (1st cir. 1970).

tional interest[27] of the district court judge in discouraging what he considers frivolous "appeals".[28]

Another inhibiting sentencing technique is illustrated in Endbinder v. Municipal Court of Boston, Mass. Adv. Sht. [1975] 2115, 330 N.E. 2d 846. In this case, a muncipal court judge informed the defendant, at the end of a first tier court trial, that the court would enter a not guilty finding if she would agree to sign a release against the complaining police officer. The defendant refused, and solely because of this refusal, the trial judge entered a guilty finding. Thereupon, the defendant "appealed" to the superior court where she was aquitted.

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27 See Bing and Rosenfeld, The Quality of Justice (1970), at pp. 86-88; and Chaffin v. Stynchone, 412 U.S. 17,27 (1973).

28 Ch. 459 §2 of the Massachusetts Acts of 1975 has abolished this practice as a "matter of law".



In addition to the deterrent sentencing procedures in the first tier courts, the defendant faces the threat of a harsher sentence being imposed if he is reconvicted in the superior court. More specifically in Mann v. Commonwealth, 359 Mass. 661 (1971), the Supreme Judicial Court held that a superior court judge may augment the district court sentence and that he does not have to affirmatively justify such action. See also Lemieux v. Robbins, 414 F. 2d 353 (1st cir. 1969), cert. denied, 397 U.S. 1017 (1970) holding the same. The decisions in both these cases rested upon North Carolina v. Pearce, 395 U.S. 711 (1969). However, the issue in Pearce was whether the threat of an increased penalty being imposed on retrial burdened the right to appellate review in contradistinction to the right to trial by jury. These rights are entirely different. In the Pearce situation, the second trial results at the defendant's "behest". In the de novo precedure, the second trial results from the government's "behest" as it cannot imprison the accused unless it is pursuant to the judgment of his peers, and under these circumstances, the imposition of an increased penalty constitutes a penalty on the right to trial by jury:

> I find it equally difficult to reconcile the increase of penalties, upon a conviction after an appeal, with the unimpaired enjoyment of the right of trial by jury. The act inflicts a fine of twenty dollars, if a conviction takes place before a justice of the peace. It must be that the legislature considered this the appropriate penalty for the offense. Certainly it cannot be said that the offense is aggravated, by the accused having claimed a trial by jury. For what, then, is the additional penalty of eighty dollars, or the additional imprisonment for thirty days, inflicted? If the offense remains the same, and the offender has done nothing but claim an appeal, in order to have his case tried by a jury, must not these additional penalties be founded on the exercise of that right? Greene v. Briggs, 10 F. Cas. 1135, 1141 (No. 5,764) (C.C.R.I. 1852).

This distinction was raised in Whitmarsh v. Commonwealth, ___Mass. ___, 316 N.E. 2d 610, 619-620 (1974), but the Supreme Judicial Court rejected it on the authority of

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Colten v. Kentucky, 407 U.S. 104 (1972). In Colten, this Court sustained an augmented sentence imposed after a trial de novo in the second tier of Kentucky's two-tier procedure. But this holding is not controlling because the two-tier procedure in Kentucky is fundamentally different than the Massachusetts procedure. In the Kentucky procedure, the accused is afforded a jury trial in the first tier. Colten expressly waived this right.[29] Accordingly, his trial de novo in the second tier of the Kentucky procedure was at his "behest" and as such was equivalent to retrial subsequent to appellate reversal as was the case in

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29 "Although appellant here was entitled to a six-man jury,... which he waived...," Colten, at p. 113. Additionally, it should be observed that Colten was not even entitled to a jury trial at any time as a matter of federal right since the maximum penalty under the statute upon which he was charged did not exceed six months imprisonment.

Pearce.[30]

Quite apart from this consideration, this Court took pains to note that in the Kentucky procedure, "the record from the lower court is not before the superior court and is irrelevant to its proceedings", and "[i]n all likelihood, the trial de novo court is not even informed of the sentence imposed in the inferior court and can hardly be said to have 'enhanced' the sentence". As such, this Court refused to impose the prophylactic rule of

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30 Colten is also distinguished by the fact that the accused in the Kentucky procedure "can circumnavigate the inferior court simply by pleading guilty and erasing immediately thereafter any consequence which would otherwise follow from tendering the plea," Colten, at. pp. 119-120. Cf. Lemieux v. Robbins, 414 F. 2d 353, 356 (1st cir. 1969), cert. denied 397 U.S. 1017 (1970): "[W]e hold the defendant has no constitutional right to complain of the "chilling effect" when in effect, he need not stand in the draft of the first instance."



Pearce. In Massachusetts, however, the record of the lower court proceedings, including the sentence imposed, is transmitted to the superior court, G.L. Ch. 278 §20 (Br. App. 10 a). If the accused is convicted again, the resentencing judge as a matter of practice usually inquires initially as to why the lower court sentence should not be reimposed. Such a procedure evidences the institutional weight of judicial comity between the two tiers in the Massachusetts system, and manifestly discourages "appeals".31

When viewed in toto, appellant submits that the above noted burdens, - the legal expenses, witness fees, loss of pay, rigors of a first tier trial, threatening sentencing techniques, and the threat of increased penalties upon retrial - are a deterrent on the exercise of the accused's right to trial

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31 The de novo jury is also aware that the accused has been previously adjudged guilty. Compare Chaffin v. Stynchone, 412 U.S. 17, 28, ftn. 13-14 (1973).

by jury. In a given case, any one of the above factors may wear down the individual and tip the scales against the exercise of his right to trial by jury. Additionally, and, perhaps most important, there exists the inherent "heavy personal strain"[32] "- pyschological, physical and financial -"[33] that results from the trial and the embarassment, humiliation and stigma[34] that attach to the conviction itself.[35] Indeed, the inescapable

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32 United States v. Jorn, 400 U.S. 470, 479 (1971).

33 Breed v. Jones, 423 U.S. ___ (1975).

34 Argersinger v. Hamlin, 407 U.S. 25, 44 (1972), (Powell concurring).

35 "[The accused] stands morally, and in respect to his character and good name, as if, after a jury's verdict of guilty, he is awarded a new trial. This is a hardship to which the common law of England and the common law of the colony in 1784 he could not be subjected." State v. Gerry, 68 N.H. 495, 509 (1896).



conclusion is that the interposition of a trial by magistrate deters the exercise of the right to trial by jury, and as such, constitutes an unconstitutional burden on the right, United States v. Jackson, 390 U.S. 570, 582, 583 (1967): "A procedure need not be inherently coercive in order that it be held to impose an impermissable burden;" for "if the provision had no other... effect than to chill the assertion of constitutional rights by penalizing those who chose to exercise them, then it would be patently unconstitutional".

## IV - THE ARGUMENTS IN SUPPORT OF MASSACHUSETTS' TRIAL DE NOVO PROCEDURE ARE WITHOUT CONSTITUTIONAL MERIT

Two arguments have been set forth to establish that the imposition of a trial by magistrate is not an unconstitutional burden on the right to trial by jury. The first is set forth by Mr. Justice Shaw in Jones v. Robbins, 8 Gray 329, 341 (1858), namely, that the only burden placed on the accused in the two-tier process is the delay and recognizance which "are the same and no greater than they would be in case the magistrate, instead

of passing sentence should, on examination, bind the accused over, or, as the necessary alternative, commit him to jail". This theory is fully rebutted by Chief Justice Carpenter in State v. Gerry, 68 N.H. 495, 505-6 (1896):

> To say that the required recognizance upon an appeal subjects the party to no greater inconvenience, - is no greater burden than the recognizance required upon an examination and binding over - if it were true, does not conclude the matter. It is not merely the recognizance but the judgment of the magistrate, the sentence without a jury trial, that burdens. But it is not true. In legal effect, the difference between recognizances upon a binding over and upon an appeal is great. In the first case, the sole consequence of a default or forfeiture is to create a debt in the amount of the recognizance, payment of which may be enforced. Upon the forfeiture of the recognizance taken on appeal not only is the defendant subjected to the payment of the amount of the recognizance, but he is also, under the



> Massachusetts statute, sentenced by the court appealed to as if he had been convicted in that court. By his default he is held to waive a jury trial. Commonwealth v. Whitney, 108 Mass. 56-7.

The Massachusetts statute referred to above was the predecessor to G.L. Ch. 278 §24, (Br. App. 11a), which requires that upon the failure of the defendant to prosecute his "appeal", "he shall be defaulted on his recognizance and the superior court may impose sentence upon him for the crime of which he was convicted."[36] This statute in

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36 The constitutionality of this procedure is pending before the Supreme Judicial Court in Costarelli v. Sheriff of Middlesex, No. 75-277. In this case, Costarelli was arrested for allegedly being in default on his "appeal" to a second tier court. Thereupon, he was brought before a judge (without his counsel being present) who imposed the one year prison sentence of the lower court from which his appeal had been taken.

effect shifts the burden to the accused, a patently unconstitutional procedure:

> A fatal objection to this doctrine is that it puts the burden of obtaining a jury trial upon the defendant, instead of the state. It compels him to appear and demand the trial, without which the constitution expressly declares he shall not be condemned. The difference between a right to jury trial upon demand made therefor and the right not to be convicted or punished until a trial is had, is wide. A man is not to be imprisoned or otherwise punished because a corrupt or ignorant magistrate has found him guilty of crime,... As long as he remains entirely passive, -as long as he neither does nor says anything relative to the charge against him, except to maintain his innocence by a plea of not guilty, - he is assured by the express terms of the constitution that he cannot be punished until the state has obtained a verdict of guilty from twelve of his neighbors. "No subject shall be deprived of life,



> liberty, or estate but by the judgment of his peers." This language does not mean - it cannot reasonably be construed to mean - that he may be tried and finally condemned by a magistrate unless he takes certain prescribed measures to procure a constitutional trial. State v. Gerry, supra, p. 506.

The second contention is that trial de novo is to the defendant's advantage in that he "gives up nothing by going to trial in the district court", Lemieux v. Robbins, supra, at p. 355, while at the same time "he actually gains the distinct advantage of a preview of the prosecution's case without having to disclose his own", Mann v. Commonwealth, 359 Mass. 664, 666 (1971). "Thus, in effect...the defendant has 'two bites at the cherry'," Mann v. Commonwealth, supra, at p. 663. Such an argument ignores the "collateral consequences"

that attach to a conviction[37] in a first tier court.[38] For example, in the instant case, Richard I. Ludwig's automobile license was automatically revoked upon his conviction for driving to endanger pursuant to G.L. Ch. 90 §24(2). Since this revocation is predicated on "the commission of a criminal offense," One Lot Stones v. United States, 409 U.S. 232, 236 ftn. 6 (1972), it is a criminal penalty,

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37 "Nor is it an answer to this to say that, when the accused is tried before a jury in the appellate court, he stands unprejudiced by his previous conviction. This may be so in theory of the statute, but it is so theoretically only; for naturally the moral effect of the conviction has a tendancy, at least, to prejudice his case in the estimation of the jury." Miller v. Commonwealth, 14 S.E. 2d 161 (1892).

38 Cf. Mayer v. City of Chicago, 404 U.S. 189, 197 (1971): "The practical effects of conviction of even petty offenses...are not to be minimized."



One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 701 (1965); United States v. United States Coin and Currency, 401 U.S. 715, 718; and Boyd v. United States, 116 U.S. 616, 634 (1886).[39] As such, at least one highest state court has held that the revocation cannot be imposed except pursuant to a jury verdict:

> In extending the right to a jury trial, we define the category of "criminal" prosecutions as including any offense a direct penalty for which may be incarceration in a jail or penal institution. It also includes offenses which may result in the loss of a valuable license, such as a driver's license or a license to pursue a common calling, occupation, or business.* It must also in-

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39 As a matter of state law, this penalty is not part of the "judgment" of the first tier court. Cf. Costarelli v. Massachusetts, 421 U.S. 93, ftn. 2 (1975). Compare Lefkowitz v. Newsome, 420 U.S. 283, 294 (1975), White dissenting.

clude offenses which, even if incarceration is not a possible punishment, still connote criminal conduct in the traditional sense of the term.

* This does not cover revocation of licenses pursuant to administrative proceedings where lawful criteria other than criminality are a proper concern in protecting public welfare and safety, as the basis of revocation or suspension in such instances is not that one has committed a criminal offense, but that the individual is not fit to be licensed, apart from consideration of only guilt or innocence of crime. Baker v. City of Fairbanks, ___ Alaska ___, 471 P. 2d 386, 402 (1970).[40]

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40 See also District of Columbia v. Colts, 282 U.S. 63, 73 (1930); and Parham v. Municipal Court, ___ Iowa ___, 199 N.W. 2d 50 (1972). Cf. In re Winship, 397 U.S. 358, 363-4, 367 (1970); In re Gault, 387 U.S. 1, 50 (1967); and Frank v. United States, 395 U.S. 147, 159-169 (1969).



The threat of the collateral consequences which attach upon conviction compels an accused to try his case in the lower court before a judge. Such a procedure forces the accused to expose his defense and is inherently unfair as is called to our attention by the Court of Appeals for the Ninth Circuit in Breed v. Jones, 497 F 2d 1160, 1168 (1974), aff'd 423 U.S. ___ (1975):

> There are basic issues of fairness upon which we should comment. Nowhere in our criminal system do we allow the prosecution to review in advance the accused's defense and, as here, hear him testify about the crime charged. The most heinous and despicable criminal is saved from such an invasion of his fundamental rights.... This offends our concepts of basic, even-handed fairness.

Likewise, cross examination of prosecution witnesses has the tendency of hardening and polishing the government's case for the de novo trial in the superior court. See e.g. Ashe v. Swenson, 397 U.S. 436, 439-440 (1970); and Carsey v. United States, 392 F. 2d 810,

813-814 (D.C. cir. 1967) which detail the metamorphasis of testimony in first and subsequent trials. Alternatively, if defense counsel does not cross examine the government's witnesses in the lower court, and if they subsequently become unavailable, their unimpeached testimony will be admitted against the accused since he had the opportunity to cross examine the witnesses in the lower court. See Commonwealth v. Mustone, 353 Mass. 490 (1968) distinguishing Pointer v. Texas, 380 U.S. 400 (1965).

V - THERE IS NO COMPELLING INTEREST TO JUSTIFY MASSACHUSETTS' DENIAL OF A TRIAL BY JURY IN THE FIRST INSTANCE

When Richard I. Ludwig was placed in jeopardy before the District Court of Northern Norfolk, it was his right to obtain a judgment of his peers. Massachusetts had no more right to deny him this fundamental right than it would have to deny him his right to confront his accusers, his right to counsel of his own choosing, his right to an impartial tribunal, or the right to remain silent. It is no answer on Massachusetts' part to



say that it offered Richard I. Ludwig a "trial de novo" with the full panoply of constitutional procedural rights. This argument was rejected in Ward v. Village of Monroeville, 409 U.S. 57, 61-62 (1972), wherein the accused was initially denied an impartial tribunal:

> Respondent also argues that any unfairness at the trial level can be corrected on appeal and trial de novo in the County Court of Common Pleas. We disagree. This "procedural safeguard" does not guarantee a fair trial in the mayor's court;...Nor in any event may the State's trial court procedure be deemed constitutionally acceptable simply because the State eventually offers a defendant an impartial adjudication. Petitioner is entitled to a neutral and detached judge in the first instance.

Massachusetts, of course, has a legitimate interest in allocating its judicial resources by maintaining a two-tier structure, Lemieux v. Robbins, 414 F 2d 353, 355 (1st cir. 1969), cert. denied, 397 U.S. 1017 (1970). The basis underlying

this interest and the two-tier structure is that the state may prosecute marginally serious crimes more efficiently in a manner other than trial by jury. Be this as it may, Massachusetts is foreclosed from differentiating between degrees of serious crimes by the conjunctive effect of Duncan, Baldwin and Williams.[41] These cases define the "petty-serious" dividing line and hold that in a "serious" crime, the accused has an unqualified right to be insulated from the full resources of the state by the interposition of the community's judgment. Accordingly, appellant submits that if Massachusetts is to maintain a two-tier structure which denies the accused a jury in the first instance, then it must tailor the procedure to the constitutional line between petty

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41 See Hasler, De Novo Jury Trials, 23 Maine Law Rev. 56, 79, 81-85 (1971).



and serious crimes.[42]

In addition to these considerations, appellant maintains that Massachusetts has no compelling state interest to justify denying the accused a trial by jury in the first instance even if, arguendo, it is assumed that the compelling interest doctrine is applicable to test the constitutionality of the deprivation of a fundamental procedural right in a criminal proceeding. The state's interest

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42 The six month demarcation line applies only with respect to the right to trial by jury and not to other Fifth or Sixth Amendment procedural rights. Cf. Argersinger v. Hamlin, 407 U.S. 25, 30, 45-46 (1975). Its historical origins are deep-rooted in common law whereas de novo jury trials were non-existent at common law or in America in 1784. See Frankfurter & Corcoran, Petty Federal Offences and the Constitutional Guarantee of Trial by Jury, 38 Harv. L. Rev. 917, 932-362 ftn. 85 (1926); and State v. Gerry, 68 N.H. 495, 499-500 (1896).

in economy cannot justify its depriving the accused of his right to jury verdict once placed in jeopardy. Justice Black made this quite clear in Green v. United States, 356 U.S. 165, 216 (1958):

> It is undoubtedly true that a judge can dispose of charges... faster and cheaper than a jury. But such trifling economies as may result have not generally been thought sufficient reason for abandoning our great constitutional safeguards aimed at protecting freedom and other basic human rights of incalculable value. Cheap easy convictions were not the primary concern of those who adopted the Constitution and Bill of Rights. Every procedural safeguard they established purposely made it more difficult for the government to convict those it accused of crimes. On their scale of value justice occupied at least as high a position as economy.

Additionally, it should be observed that Massachusetts' interest in maintaining a two-tier structure can be achieved equally as well, if not more efficiently, by allowing the accused the option of proceeding



initially in the first tier or, alternatively, allowing him to obtain a jury trial in the first instance in the second tier.

More specifically, there are certain cases in which a defendant, if given an option, will always choose a trial by jury in the first instance, or if not given the option, will always "appeal" for a trial de novo unless deterred therefrom. These cases include offenses where conviction carries serious collateral consequences such as the revocation of one's driver's license, or revocation of parole, or the loss of one's right to carry on a trade or practice a profession.[43] They also included instances where

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43 This is particularly true in driving under the influence of intoxicating liquor cases where the reversal rate of district court convictions by juries is extremely high. See Boston Herald American, Feb. 24, 1973, which reported that in one session of Suffolk Superior Court "19 out of 22 defendants who appealed lower court findings of guilty imposed by judges were subsequently acquitted by juries of their peers!"

there exists a close issue of reasonable doubt or high probability that the integrity of the trial process would be impaired by multiple trials. If the defendant is allowed the option of a jury verdict in the first instance in these cases, the meaningless first tier proceedings will be eliminated, thereby increasing the efficiency of the state's two-tier system. On the other hand, the option procedure would preserve the state's interest as, statistically, most defendants would waive their right to a jury trial in the first instance.[44] Indeed, the only appreciable additional burden on the state would be the granting of jury trials in those cases where the accused would have been deterred by the interposition of trial by magistrate, a result

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44 The two-tier option procedure has been in operation in Rhode Island in the aftermath of State v. Holliday, 109 R.I. 93 (1971). Currently statistics show 97.2 percent of all defendants waive their right to a jury trial in the first instance. See also Baldwin v. New York, 399 U.S. 66, 74 ftn. 22 (1970).



of which Massachusetts cannot complain. This burden, in itself, is constitutionally insignificant in comparison to the burden placed on the states by this Court's decision in Baldwin v. New York, 399 U.S. 71, 74, ftn. 22 (1970), guaranteeing the accused "the important right to trial by jury where the possible penalty exceeds six months imprisonment". Accordingly, appellant submits that, on balance, the overall interest of Massachusetts in maintaining a two-tier structure will not be significantly impaired by its granting the accused an option of a jury verdict in the first instance.[45]

## VI - MASSACHUSETTS' PROCEDURE OF FORCING AN ACCUSED TO "RUN THE GANTLET TWICE" VIOLATES THE DOUBLE JEOPARY PROVISIONS OF THE FIFTH AMENDMENT

In Benton v. Maryland, 395 U.S. 784, 794 (1969), this Court

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45 See Constitutionality of the De Novo Procedure, 55 B.U. Law Rev. 25, 54-59 (1975).

bound the states to the double jeopardy provisions of the Fifth Amendment by incorporating them in the Fourteenth Amendment. The underpinnings of these provisions are set forth by Justice Harlan in United States v. Jorn, 400 U.S. 470, 479 (1971):

> A power in government to subject the individual to repeated prosecutions for the same offense would cut deeply into the framework of procedural protections which the Constitution establishes for the conduct of a criminal trial. And society's awareness of the heavy personal strain which a criminal trial represents for the individual defendant is manifested in the willingness to limit the Government to a single criminal proceeding to vindicate its very vital interest in enforcement of criminal laws. Both these considerations are expressed in Green v. United States, 355 U.S. 184, 187-188 (1957), where the Court noted that the policy underlying this provision "is that the State with all its resources and power should not be allowed to make repeated attempts



> to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense, and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."

Judged in light of these principles, Massachusetts' two-tier procedure inherently runs counter to the Fifth Amendment since it exposes the accused to the threat of multiple trials. Upon conviction in a lower court, the accused is subjected to the "embarrassment" of being found guilty and "appealing" in a criminal proceeding. While awaiting his "trial de novo" in the second tier, he is compelled "to live in a continuing state of anxiety and insecurity" while at the same time the conviction "[enhances] the possibility that even though innocent he may be found guilty". Additionally, the de novo trial in the second tier subjects the accused a second time to the "heavy personal strain which a criminal trial represents". Such a procedure is not consonant with limiting "the government to a single criminal proceeding to vindicate its very

vital interest in enforcement of criminal laws", and implicit in limiting the government to one crack at the defendant is limiting it to a proceeding which comports with Sixth Amendment standards.

The prohibitions of the double jeopardy clause not only bar punishing a defendant twice for the same crime, but bar placing him to his defense a second time, Ex Parte Lange, 18 Wall 163, 169 (1893). The prohibitions thus relate to a "potential or risk of trial and conviction, not punishment," Price v. Georgia, 398 U.S. 323, 329 (1970), emphasis added in Breed v. Jones, 423 U.S. ___, ___, (1975). For this reason, the double jeopardy clause bars the government from seeking to overturn an acquittal of the accused, United States v. Ball, 163 U.S. 662, 669-671 (1896), or from retrying the accused whose conviction is set aside on the grounds of "prosecutorial or judicial overreaching", United States v. Tateo, 377 U.S. 463, 468, ftn. 3 (1964); United States v. Jorn, supra, at pp. 484-485.

But a second trial is not barred in all circumstances. For instance, where a second trial results from a conviction being



set aside upon appellate review initiated at the defendant's "behest", retrial is not barred as the accused's "double jeopardy interests, however defined, do not go so far as to compel society to so mobilize its decisionmaking resources that it will be prepared to assure the defendant a single proceeding free from harmful governmental or judicial error," United States v. Jorn, supra, p. 484. Similarly, a second trial is not barred where the first trial is aborted due to a "manifest necessity," United States v. Perez, 9 Wheat. 579, 580 (1824), as such a result "would be too high a price to pay for the added assurance of personal security and freedom from governmental harassment which such a mechanical rule would provide," United States v. Jorn, supra, at p. 480.[46] However, the short of

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46 In these circumstances, the "defendant's valued right to have his trial completed by a particular tribunal must... be subordinated to the public's interest in fair trials designed to end in just judgments", Wade v. Hunter, 336 U.S. 684, 689 (1949).

the matter is that "[t]he policy of avoiding multiple trials has been regarded as so important that exceptions to principle have been only grudgingly allowed", United States v. Wilson, 420 U.S. 332, 343 (1975).

Applying these principles to the Massachusetts procedure in question, it is observed that the de novo procedure forces the accused to the "risk" of two trials and as such runs counter to the policy underlying the double jeopardy provisions of "avoiding multiple trials", United States v. Wilson, supra, at p. 343. Besides this, the second trial in the de novo procedure is not a retrial at the defendant's request, although it is denominated as an "appeal", but rather, the second trial is at the government's "behest" as it cannot imprison the defendant without affording him a jury verdict. Such retrials, however, are barred under the principles enunciated in United States v. Ball, supra, p. 669-671.

Conversely, Richard I. Ludwig maintains that once he was placed in jeopardy, Massachusetts had no more right to intentionally deprive him of his right to a jury



verdict than it would have to deprive him of his right to counsel, or his right to confront his accusers, or his right to remain silent. Moreover, the intentional denial of the right to trial by jury is equivalent to "prosecutorial over-reaching" which prevents a fair trial from taking place, or to the declaration of a mistrial, absent a "manifest necessity" or without the defendant's consent, which prevents a verdict from being reached at all. By either analogy, retrial is barred by the double jeopardy provisions of the Fifth Amendment and accordingly, appellant submits that Massachusetts' procedure of forcing the accused to "run the gantlet twice" to obtain that which the Constitution guarantees is patently unconstitutional.

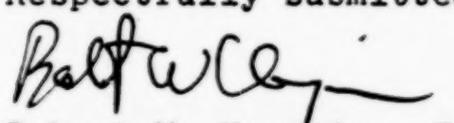
## CONCLUSION

Appellant submits 1) that his conviction in the District Court of Northern Norfolk was unconstitutional since he was denied his Sixth Amendment right to a trial by jury in the first instance; and 2) that reprosecution in the District Court of Northern Norfolk

Six-Man Jury division was barred by the double jeopardy provisions of the Fifth Amendment.

WHEREFORE, appellant prays this Court to reverse the decision of the Supreme Judical Court.

Respectfully submitted,



Robert W. Hagopian, Esq.
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02093



APPENDIX

Article XII of the Massachusetts Declaration of Rights:

No subject shall be held to answer for any crimes or offense, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to produce all proofs, that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defense by himself, or his counsel, at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land.

And the legislature shall not make any law, that shall subject any person to a capital or infamous punishment excepting for the government of the army and navy, without trial by jury.

G.L. Ch. 218 Sec. 26

District courts shall have original jurisdiction, concurrent with the superior court, of the following offenses committed within their respective district or otherwise made punishable therein: all violations of by-laws, orders, ordinances, rules and regulations, made by cities, towns and public officers, all misdemeanors, except libels, all felonies punishable by imprisonment in the state prison for not more than five years, the crimes mentioned in sections sixteen, seventeen, eighteen, nineteen, twenty-eight and forty-nine of chapter two hundred and sixty-six, and the crimes of forgery of a promissory note, or of an order for money or other property, and of uttering as true such a forged note or order, knowing the same to be forged. They shall have jurisdiction of proceedings referred to them under the provisions of section four A of chapter two hundred and eleven.

G.L. Ch. 278 Sec. 18

Whoever is convicted of a crime before a district court may appeal the finding of guilty or the sentence imposed thereon to the superior court or may appeal to and claim a jury of six in a district court



in accordance with section twenty-seven A of chapter two hundred and eighteen and at the time of conviction shall be notified of his right to take such appeal. The case shall be entered into the superior court on the return day next after the appeal is taken, and the appellant shall be released on personal recognizance or committed, in accordance with the procedures set forth in section fifty-eight of chapter two hundred seventy-six, until he recognized to the commonwealth, in such sum and with such surety or sureties as the court requires, with condition to appear at the superior court on said return day and at any subsequent time to which the case may be continued, if not previously surrendered and discharged, and so from time to time until the final sentence, order or decree, and not depart without leave, and in the meantime to keep the peace and be of good behavior. If the appellant is not released on personal recognizance and is committed for failure to recognize, the superior court shall thereupon have jurisdiction of the case for the purpose of revising the amount of bail required as aforesaid. The appellant shall not be required to advance any fees upon claiming his appeal or in prosecuting the same. Notwithstanding any other

provision of law, a defendant, after a finding of guilty in a district court, may appeal therefrom and shall therafter be entitled to a trial de novo in the superior court or may appeal to and claim a jury of six in a district court in accordance with said section twenty-seven A.

G.L. Ch. 218 Sec. 27A reads in part:

. . . . . .

Any defendant in a district court of Norfolk county found guilty of an offense or crime over which the district court have original jurisdiction under the provisions of section twenty-six may appeal and claim a jury of six in the district court of norther Norfolk or the district court of East Norfolk.

. . . . . .

Such claim of appeal shall be in writing and shall constitute a waiver of any claim of appeal to a trial by jury in the superior court or other disposition in said superior court.

Any defendant found guilty in any of said district courts of an offense or crime over which the district courts have orginal jurisdiction



under the provisions of section twenty-six who has appealed to the superior court may, in the discretion of a justice of the superior court, at any time before trial on such appeal, claim a jury of six in the district court designated in paragraphs one through ten of this section. Such claim shall be in writing and shall constitute a wiaver of any right to a trial by a jury in the superior court or other disposition in said superior court. When a claim for a trial by jury of six has been made under the provisions of this paragraph, the clerk of the superior court shall forthwith forward to the clerk of the said district court all the papers in the case which have been filed in the superior court.

The justice presiding at such session over a jury of six shall have and exercise all the powers and duties which a justice of the superior court has and may exercise in the trial and disposition of such cases.

No justice so sitting shall act in a case in which he has either sat or held an inquest in the district court or otherwise has taken part in any proceeding therein.

Trials by such juries of six in a district court shall be held in the courthouse of said court or a courthouse of the superior court within the same county, and shall proceed in accordance with the provisions of law applicable to trials by jury in the superior court, except that the number of peremptory challenges shall be limited to two to each defendant. The commonwealth shall be entitled to as many challenges as equal the whole number to which all of the defendants in the case are entitled. Jurors shall be drawn from the pool of jurors available for the jury sessions in either civil or criminal sessions in the superior court. The district attorney for the district in which the alleged offense or offenses occurred shall appear for the commonwealth in all cases. The chief justice of the district courts shall arrange for the jury sessions of the said district courts and shall assign justices and special justices thereto, to the end that speedy trials may be provided for such appeals. In the event of a trial by a jury of six in a district court, review may be had directly by the supreme judicial court by a bill of exceptions, appeal, report or otherwise, in the same manner provided for trials by jury in the superior court. The defendant



may elect to waive a jury of six in the manner provided by section six of chapter two hundred and sixty-three, but such waiver shall not revive any right to a trial by jury or other disposition in the superior court which had been waived under the provisions of the eleventh or twelfth paragraphs, of this section.

The justice presiding at such session over a jury of six shall, upon the request of the defendant, appoint a stenographer, who shall be sworn, and who shall take stenographic notes of all the testimony given at the trial, and shall provide the parties thereto with a transcript of his notes or any part thereof taken at the trial or hearing for which he shall be paid by the party requesting it at the rate fixed by the chief justice of the district courts; provided, however, that such rate shall not exceed the rate provided by section eighty-eight of chapter two hundred and twenty-one. Said chief justice may make regulations not inconsistent with law relative to the assignments, duties and service of stenographers appointed for any district court, and any other matter relative to such stenographers. The compensation and expenses of said stenographer shall be paid by the county.

G.L. 278 Sec. 18A

Any defendant, in any district court of Suffolk county or in the municipal court of the city of Boston, found guilty of a violation of a by-law, order, ordinance, rule or regulation made by a city or town or public officer or of any other misdemeanor, except libel, may appeal and claim a jury of twelve in the municipal court of the city of Boston. By claiming such appeal, the said claimant shall be deemed to have waived any claim of appeal to a trial by a jury in the superior court or other disposition in said superior court.

Any defendant, found guilty in any district court of Suffolk county or in the municipal court of the city of Boston, of a violation of any of the offenses enumerated in the first paragraph of this section who has appealed to the superior court, may, at any time before trial on such appeal, claim a trial by a jury of twelve in the municipal court of the city of Boston and by so doing shall be deemed to have waived any right to a trial by a jury in the superior court or other disposition in said superior court. When a claim for a trial by a jury of twelve in the municipal court of the city of Boston has been made



under the provisions of this paragraph, the clerk of the superior court shall forthwith forward to the clerk of said municipal court of the city of Boston all the papers in the case which have been filed in the superior court.

The justice presiding at such session over a jury of twelve in said municipal court of the city of Boston shall have and exercise all the powers and duties which a justice of the superior court has. and may exercise in the trial and disposition of such cases.

No justice so sitting shall act in a case in which he has either sat or held an inquest in the district court or otherwise has an interest.

Trials by such juries of twelve shall proceed in accordance with the provisions of law and rules of court applicalbe to trials by jury in the superior court. The commonwealth shall be entitled to as many challenges as equal the whole number to which all of the defendants in the case are entitled. Jurors shall be drawn from the pool of jurors available for the jury sessions in the superior court for Suffolk county. The district attorney for the Suffolk district shall appear

for the commonwealth in all cases. The chief justice of the municipal court of the city of Boston shall arrange for jury sessions in the said municipal court and shall assign justices and special justices thereto, to the end that speedy trials may be provided for such appeals. In the event of a trial by a jury of twelve in the said municipal court, review may be had directly to the supreme judicial court by a bill of exceptions, appeal, report or otherwise in the same manner provided for trials by jury in the superior court. Any person taking an appeal under this section shall be subject to the municipal court of the city of Boston in matters of recognizance. In such matters, the said municipal court shall have all of the powers and duties of, and shall proceed in the same manner as the superior court.

G.L. Ch. 278 Sec. 20

Upon such appeal, the clerk of the district court shall transmit to the clerk of the superior court a copy of the complaint and of the record of conviction, the original recognizances, a list of the witnesses, the appearance of the attorney for the defendant, if any is entered, and a statement of the expenses and no other papers need be transmitted.



G.L. Ch. 278 Sec. 24

If the appellant fails to enter and prosecute his appeal, he shall be defaulted on his recognizance and the superior court may impose sentence upon him for the crime of which he was convicted, as if he had been convicted in said court, and, if he is not then in custody, may issue process to bring him into court to receive sentence.

G.L. Ch. 278 Sec. 2

Issues of fact joined upon an indictment or complaint shall, in the superior court, be tried by a jury drawn and returned in the manner provided for the trial of issues of fact in civil causes, unless the person indicted or complained against elects to be tried by the court as provided by law.

G.L. Ch. 263 Sec. 6

A person indicted for a crime shall not be convicted thereof except by confessing his guilty in open court, by admitting the truth of the charge against him by his plea or demurrer or by the verdict of a jury accepted and recorded by the court or, in any criminal case other than a capital case, whether

begun by indictment or upon complaint
or any defendant in the housing
ocurt of the city of Boston or in
the housing court of the county
of Hampden in a criminal case, may,
if he shall so elect, when called
upon to plead, or later and before
a jury has been impanelled to try
him upon such indictment or complaint,
waive his right to trial by jury
by signing a written waiver thereof
and filing the same with the clerk
of the court, whereupon he shall
be tried by the court instead of
by a jury, but not, however, unless
all the defendants, if there are
two or more charged with offenses
growing out of the same single chain
of circumstances or events whether
prosecuted under the same or different
indictments or complaints shall
have exercised such election before
a jury has been impanelled to try
any of the defendants; and in every
such case the court shall have jurisdic-
tion to hear and try such cause
and render judgment and sentence
thereon.

G.L. Ch. 90 Sec.24 reads in part:

(2)(a) Whoever upon any way or in
any place to which the public has
a right of access, or any place
to which members of the public have
access as invitees or licensees,
operates a motor vehicle recklessly,



or operates such a vehicle negligently
so that the lives or safety of the
public might be endangered...shall
be punished by a fine of not less
than twenty dollars nor more than
two hundred dollars or by imprisonment
for not less than two weeks nor
more than two years, or both;...

(b) A conviction of a violation
of the preceding paragraph of this
section shall be reported forthwith
by the court or magistrate to the
registrar, who may in any event,
and shall unless the court or magistrate
recommends otherwise, revoke immediate-
ly the license or right to operate
of the person so convicted, and
no appeal, motion for new trial
or exceptions shall operate to stay
the revocation of the license or
right to operate. If it appears
by the records of the registrar
that the person so convicted is
the owner of a motor vehicle or
has exclusive control of any motor
vehicle as a manufacturer or dealer
or otherwise, the registrar may
revoke the certificate of registration
of any or all motor vehicles so
owned or exclusively controlled.

(c) The registrar, after having
revoked the license or right to
operate of any person under the
preceding paragraph of this section,
in his discretion may issue a new

license or reinstate the right to operate to him, if the prosecution of such person in the superior court has terminated in favor of the defendant, or, after an investigation or upon hearing, may issue a new license or reinstate the right to operate to a person convicted in any court of the violation of any provision of paragraph (a) of subdivision (2) of this section; provided, that no new license or right to operate shall be issued by the registrar to...any person convicted of violating any other provision of paragraph (a) of subdivision (2) of this section until sixty days after the date of his original conviction if for a first offense, or one year after the date of any subsequent conviction within a period of three years. But the registrar, after investigation, may at any time rescind the revocation of a license or right to operate revoked because of a conviction of operating a motor vehicle upon any way or in any place to which the public has a right of access, or any place to which members of the public have access as invitees or licensees, negligently so that the lives or safety of the public might be endangered.